Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

No. 76-255

IN THE

Supreme Court of the United States

October Term, 1976

HAZELWOOD SCHOOL DISTRICT; C.O. McDONALD, Superintendent; ROBERT BISCHOF, ROBERT COLEMAN, DOROTHY SMITH, CHARLES SWEENEY, DONALD MATTOX and MILTON STRAUSS, Members of the Board of Education of the Hazelwood School District,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF

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This case squarely presents the important question whether Title VII may constitutionally be applied to a state agency absent proof of purposeful discrimination. Respondent's assertion that "the court of appeals did not rest its decision upon statistical evidence alone" (Br. in Opp. 7) is irrelevant. The controlling, undisputed fact is that the court below conspicuously did not find any purposeful discrimination by the Hazelwood School District.

The court of appeals based its finding of a pattern or practice of discrimination here on statistics, not on evidence showing that 16 blacks were not hired to fill open positions at Hazelwood. (*See* Pet. 25b-26b.) Moreover, there is every indication that the evidence as to the 16 black applicants, standing alone, would not have led to such a finding. Respondent cites no authority for its contrary claim (Br. in Opp. 8) and, in fact, the court below considered evidence of individual cases of alleged discrimination separately, at the end of its opinion, and explicitly relegated its findings regarding these cases to the secondary status of evidence merely "buttressing" the controlling statistical showing. (Pet. 14b.) Indeed, there is no indication in the opinion below that the court would even have found discrimination in these 16 cases (among 41 that it reviewed) in the absence of its anterior, statistics-based finding of a pattern or practice of discrimination.

Whether it would have done so is a question that this Court need not answer. Should this Court hold with petitioners that the decision below is invalid for lack of a finding of purposeful discrimination and for reliance on statistics that distort rather that depict, then petitioners would be entitled (a) to relief from the burden of the general provisions of the remedial order directed by the court of appeals (Pet. 26b-28b) and (b) reconsideration by the courts below of the individual cases uninfluenced by the belief that they were pieces of a pattern of discrimination. In that reconsideration it will surely be relevant that the record shows that Hazelwood hired at least 16 blacks during the 1971-72 and 1972-73 school years — 23 percent of the total number of blacks who applied for teaching positions there, more than twice the rate at which Hazelwood hired overall.

This Court need not balance the conflicting evidence because, as pointed out above, the court of appeals here in fact made no finding of purposeful discrimination. It is

thus not petitioners, but respondent that seeks to have the Court act "in the abstract" (Br. in Opp. 5), by asking it to weigh the sufficiency of evidence to support a hypothetical judgment that was never reached below. If proof of discriminatory purpose is required to establish violation of Title VII by a state agency, the court of appeals applied an erroneous legal standard in this case. This, and not any need to review the sufficiency of evidence, is why the petition for a writ of certiorari should be granted here.

Respectfully submitted,

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